

AMENDED IN SENATE APRIL 2, 2009

SENATE BILL

No. 203

Introduced by Senator Harman

(Coauthors: Senators Dutton, Huff, Runner, and Walters)

*(Coauthors: Assembly Members Bill Berryhill, DeVore, Fletcher,
Harkey, Jeffries, Niello, and Smyth)*

February 23, 2009

An act to amend Sections 311, 311.1, 311.2, 311.3, 311.4, 311.5, 311.7, 311.10, and 311.11 of the Penal Code, relating to child pornography.

LEGISLATIVE COUNSEL'S DIGEST

SB 203, as amended, Harman. Child pornography: separate offense per child: Internet distribution.

Existing law includes provisions criminalizing conduct involving obscene matter and child pornography. In *People v. Hertzig* (2007) 156 Cal.App.4th 398, the court, in interpreting one of these, a child pornography possession provision, held that the possession of multiple video images on a laptop computer was a single violation. In *People v. Manfredi* (2008) 169 Cal.App.4th 622, the court, in interpreting the same provision, held that the defendant's simultaneous possession of multiple child pornography materials at the same location was a single violation.

This bill would revise the provisions criminalizing conduct involving obscene matter and child pornography to provide that the depiction or involvement of each individual person pursuant to any of those provisions shall constitute a distinct and separate offense.

Existing law defines the term "distribute" for purposes of crimes relating to obscene matter.

This bill would include within the definition of “distribute” making available for access or possession over the Internet.

By revising the definition of existing crimes to expand their application, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 311 of the Penal Code is amended to
2 read:

3 311. As used in this chapter, the following definitions apply:

4 (a) “Obscene matter” means matter, taken as a whole, that to
5 the average person, applying contemporary statewide standards,
6 appeals to the prurient interest, that, taken as a whole, depicts or
7 describes sexual conduct in a patently offensive way, and that,
8 taken as a whole, lacks serious literary, artistic, political, or
9 scientific value.

10 (1) If it appears from the nature of the matter or the
11 circumstances of its dissemination, distribution, or exhibition that
12 it is designed for clearly defined deviant sexual groups, the appeal
13 of the matter shall be judged with reference to its intended recipient
14 group.

15 (2) In prosecutions under this chapter, if circumstances of
16 production, presentation, sale, dissemination, distribution, or
17 publicity indicate that matter is being commercially exploited by
18 the defendant for the sake of its prurient appeal, this evidence is
19 probative with respect to the nature of the matter and may justify
20 the conclusion that the matter lacks serious literary, artistic,
21 political, or scientific value.

22 (3) In determining whether the matter taken as a whole lacks
23 serious literary, artistic, political, or scientific value in description
24 or representation of those matters, the fact that the defendant knew
25 that the matter depicts persons under the age of 16 years engaged

1 in sexual conduct, as defined in subdivision (c) of Section 311.4,
2 is a factor that may be considered in making that determination.

3 (b) “Matter” means any book, magazine, newspaper, or other
4 printed or written material, or any picture, drawing, photograph,
5 motion picture, or other pictorial representation, or any statue or
6 other figure, or any recording, transcription, or mechanical,
7 chemical, or electrical reproduction, or any other article, equipment,
8 machine, or material. “Matter” also means live or recorded
9 telephone messages if transmitted, disseminated, or distributed as
10 part of a commercial transaction.

11 (c) “Person” means any individual, partnership, firm,
12 association, corporation, limited liability company, or other legal
13 entity.

14 (d) “Distribute” means transfer possession of, whether with or
15 without consideration, including making available for access or
16 possession over the Internet.

17 (e) “Knowingly” means being aware of the character of the
18 matter or live conduct.

19 (f) “Exhibit” means show.

20 (g) “Obscene live conduct” means any physical human body
21 activity, whether performed or engaged in alone or with other
22 persons, including but not limited to singing, speaking, dancing,
23 acting, simulating, or pantomiming, taken as a whole, that to the
24 average person, applying contemporary statewide standards,
25 appeals to the prurient interest and is conduct that, taken as a whole,
26 depicts or describes sexual conduct in a patently offensive way
27 and that, taken as a whole, lacks serious literary, artistic, political,
28 or scientific value.

29 (1) If it appears from the nature of the conduct or the
30 circumstances of its production, presentation, or exhibition that it
31 is designed for clearly defined deviant sexual groups, the appeal
32 of the conduct shall be judged with reference to its intended
33 recipient group.

34 (2) In prosecutions under this chapter, if circumstances of
35 production, presentation, advertising, or exhibition indicate that
36 live conduct is being commercially exploited by the defendant for
37 the sake of its prurient appeal, that evidence is probative with
38 respect to the nature of the conduct and may justify the conclusion
39 that the conduct lacks serious literary, artistic, political, or scientific
40 value.

(3) In determining whether the live conduct taken as a whole lacks serious literary, artistic, political, or scientific value in description or representation of those matters, the fact that the defendant knew that the live conduct depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor that may be considered in making that determination.

(h) The Legislature expresses its approval of the holding of *People v. Cantrell*, 7 Cal.App.4th 523, that, for the purposes of this chapter, matter that “depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct” is limited to visual works that depict that conduct.

SEC. 2. Section 311.1 of the Penal Code is amended to read:

311.1. (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, develops, duplicates, or prints any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, with intent to distribute or to exhibit to, or to exchange with, others, or who offers to distribute, distributes, or exhibits to, or exchanges with, others, any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4, shall be punished either by imprisonment in the county jail for up to one year, by a fine not to exceed one thousand dollars (\$1,000), or by both the fine and imprisonment, or by imprisonment in the state prison, by a fine not to exceed ten thousand dollars (\$10,000), or by the fine and imprisonment.

(b) This section does not apply to the activities of law enforcement and prosecuting agencies in the investigation and prosecution of criminal offenses or to legitimate medical, scientific, or educational activities, or to lawful conduct between spouses.

(c) This section does not apply to matter which depicts a child under the age of 18 years, which child is legally emancipated,

1 including lawful conduct between spouses when one or both are
2 under the age of 18 *years*.

3 (d) It does not constitute a violation of this section for a
4 telephone corporation, as defined by Section 234 of the Public
5 Utilities Code, to carry or transmit messages described in this
6 chapter or perform related activities in providing telephone
7 services.

8 (e) The depiction of each individual person as described in this
9 section shall constitute a distinct and separate offense.

10 SEC. 3. Section 311.2 of the Penal Code is amended to read:

11 311.2. (a) Every person who knowingly sends or causes to be
12 sent, or brings or causes to be brought, into this state for sale or
13 distribution, or in this state possesses, prepares, publishes,
14 produces, or prints, with intent to distribute or to exhibit to others,
15 or who offers to distribute, distributes, or exhibits to others, any
16 obscene matter is for a first offense, guilty of a misdemeanor. If
17 the person has previously been convicted of any violation of this
18 section, the court may, in addition to the punishment authorized
19 in Section 311.9, impose a fine not exceeding fifty thousand dollars
20 (\$50,000).

21 (b) Every person who knowingly sends or causes to be sent, or
22 brings or causes to be brought, into this state for sale or distribution,
23 or in this state possesses, prepares, publishes, produces, develops,
24 duplicates, or prints any representation of information, data, or
25 image, including, but not limited to, any film, filmstrip, photograph,
26 negative, slide, photocopy, videotape, video laser disc, computer
27 hardware, computer software, computer floppy disc, data storage
28 media, CD-ROM, or computer-generated equipment or any other
29 computer-generated image that contains or incorporates in any
30 manner, any film or filmstrip, with intent to distribute or to exhibit
31 to, or to exchange with, others for commercial consideration, or
32 who offers to distribute, distributes, or exhibits to, or exchanges
33 with, others for commercial consideration, any obscene matter,
34 knowing that the matter depicts a person under the age of 18 years
35 personally engaging in or personally simulating sexual conduct,
36 as defined in Section 311.4, is guilty of a felony and shall be
37 punished by imprisonment in the state prison for two, three, or six
38 years, or by a fine not exceeding one hundred thousand dollars
39 (\$100,000), in the absence of a finding that the defendant would

1 be incapable of paying that fine, or by both that fine and
2 imprisonment.

3 (c) Every person who knowingly sends or causes to be sent, or
4 brings or causes to be brought, into this state for sale or distribution,
5 or in this state possesses, prepares, publishes, produces, develops,
6 duplicates, or prints any representation of information, data, or
7 image, including, but not limited to, any film, filmstrip, photograph,
8 negative, slide, photocopy, videotape, video laser disc, computer
9 hardware, computer software, computer floppy disc, data storage
10 media, CD-ROM, or computer-generated equipment or any other
11 computer-generated image that contains or incorporates in any
12 manner, any film or filmstrip, with intent to distribute or exhibit
13 to, or to exchange with, a person 18 years of age or older, or who
14 offers to distribute, distributes, or exhibits to, or exchanges with,
15 a person 18 years of age or older any matter, knowing that the
16 matter depicts a person under the age of 18 years personally
17 engaging in or personally simulating sexual conduct, as defined
18 in Section 311.4, shall be punished by imprisonment in the county
19 jail for up to one year, or by a fine not exceeding two thousand
20 dollars (\$2,000), or by both that fine and imprisonment, or by
21 imprisonment in the state prison. It is not necessary to prove
22 commercial consideration or that the matter is obscene in order to
23 establish a violation of this subdivision. If a person has been
24 previously convicted of a violation of this subdivision, he or she
25 is guilty of a felony.

26 (d) Every person who knowingly sends or causes to be sent, or
27 brings or causes to be brought, into this state for sale or distribution,
28 or in this state possesses, prepares, publishes, produces, develops,
29 duplicates, or prints any representation of information, data, or
30 image, including, but not limited to, any film, filmstrip, photograph,
31 negative, slide, photocopy, videotape, video laser disc, computer
32 hardware, computer software, computer floppy disc, data storage
33 media, CD-ROM, or computer-generated equipment or any other
34 computer-generated image that contains or incorporates in any
35 manner, any film or filmstrip, with intent to distribute or exhibit
36 to, or to exchange with, a person under 18 years of age, or who
37 offers to distribute, distributes, or exhibits to, or exchanges with,
38 a person under 18 years of age any matter, knowing that the matter
39 depicts a person under the age of 18 years personally engaging in
40 or personally simulating sexual conduct, as defined in Section

1 311.4, is guilty of a felony. It is not necessary to prove commercial
2 consideration or that the matter is obscene in order to establish a
3 violation of this subdivision.

4 (e) Subdivisions (a) to (d), inclusive, do not apply to the
5 activities of law enforcement and prosecuting agencies in the
6 investigation and prosecution of criminal offenses, to legitimate
7 medical, scientific, or educational activities, or to lawful conduct
8 between spouses.

9 (f) This section does not apply to matter that depicts a legally
10 emancipated child under the age of 18 years or to lawful conduct
11 between spouses when one or both are under the age of 18 years.

12 (g) It does not constitute a violation of this section for a
13 telephone corporation, as defined by Section 234 of the Public
14 Utilities Code, to carry or transmit messages described in this
15 chapter or to perform related activities in providing telephone
16 services.

17 (h) The depiction of each individual person as described in this
18 section shall constitute a distinct and separate offense.

19 SEC. 4. Section 311.3 of the Penal Code is amended to read:

20 311.3. (a) A person is guilty of sexual exploitation of a child
21 if he or she knowingly develops, duplicates, prints, or exchanges
22 any representation of information, data, or image, including, but
23 not limited to, any film, filmstrip, photograph, negative, slide,
24 photocopy, videotape, video laser disc, computer hardware,
25 computer software, computer floppy disc, data storage media,
26 CD-ROM, or computer-generated equipment or any other
27 computer-generated image that contains or incorporates in any
28 manner, any film or filmstrip that depicts a person under the age
29 of 18 years engaged in an act of sexual conduct.

30 (b) As used in this section, "sexual conduct" means any of the
31 following:

32 (1) Sexual intercourse, including genital-genital, oral-genital,
33 anal-genital, or oral-anal, whether between persons of the same or
34 opposite sex or between humans and animals.

35 (2) Penetration of the vagina or rectum by any object.

36 (3) Masturbation for the purpose of sexual stimulation of the
37 viewer.

38 (4) Sadoomasochistic abuse for the purpose of sexual stimulation
39 of the viewer.

1 (5) Exhibition of the genitals or the pubic or rectal area of any
2 person for the purpose of sexual stimulation of the viewer.

3 (6) Defecation or urination for the purpose of sexual stimulation
4 of the viewer.

5 (c) Subdivision (a) does not apply to the activities of law
6 enforcement and prosecution agencies in the investigation and
7 prosecution of criminal offenses or to legitimate medical, scientific,
8 or educational activities, or to lawful conduct between spouses.

9 (d) Every person who violates subdivision (a) shall be punished
10 by a fine of not more than two thousand dollars (\$2,000) or by
11 imprisonment in a county jail for not more than one year, or by
12 both that fine and imprisonment. If the person has been previously
13 convicted of a violation of subdivision (a) or any section of this
14 chapter, he or she shall be punished by imprisonment in the state
15 prison.

16 (e) The provisions of this section do not apply to an employee
17 of a commercial film developer who is acting within the scope of
18 his or her employment and in accordance with the instructions of
19 his or her employer, provided that the employee has no financial
20 interest in the commercial developer by which he or she is
21 employed.

22 (f) Subdivision (a) does not apply to matter that is unsolicited
23 and is received without knowledge or consent through a facility,
24 system, or network over which the person or entity has no control.

25 (g) The depiction of each individual person as described in this
26 section shall constitute a distinct and separate offense.

27 SEC. 5. Section 311.4 of the Penal Code is amended to read:

28 311.4. (a) Every person who, with knowledge that a person is
29 a minor, or who, while in possession of any facts on the basis of
30 which he or she should reasonably know that the person is a minor,
31 hires, employs, or uses the minor to do or assist in doing any of
32 the acts described in Section 311.2, shall be punished by
33 imprisonment in the county jail for up to one year, or by a fine not
34 exceeding two thousand dollars (\$2,000), or by both that fine and
35 imprisonment, or by imprisonment in the state prison. If the person
36 has previously been convicted of any violation of this section, the
37 court may, in addition to the punishment authorized in Section
38 311.9, impose a fine not exceeding fifty thousand dollars (\$50,000).

39 (b) Every person who, with knowledge that a person is a minor
40 under the age of 18 years, or who, while in possession of any facts

1 on the basis of which he or she should reasonably know that the
2 person is a minor under the age of 18 years, knowingly promotes,
3 employs, uses, persuades, induces, or coerces a minor under the
4 age of 18 years, or any parent or guardian of a minor under the
5 age of 18 years under his or her control who knowingly permits
6 the minor; to engage in or assist others to engage in either posing
7 or modeling alone or with others for purposes of preparing any
8 representation of information, data, or image, including, but not
9 limited to, any film, filmstrip, photograph, negative, slide,
10 photocopy, videotape, video laser disc, computer hardware,
11 computer software, computer floppy disc, data storage media,
12 CD-ROM, or computer-generated equipment or any other
13 computer-generated image that contains or incorporates in any
14 manner, any film, filmstrip, or a live performance involving; sexual
15 conduct by a minor under the age of 18 years alone or with other
16 persons or animals, for commercial purposes, is guilty of a felony
17 and shall be punished by imprisonment in the state prison for three,
18 six, or eight years.

19 (c) Every person who, with knowledge that a person is a minor
20 under the age of 18 years, or who, while in possession of any facts
21 on the basis of which he or she should reasonably know that the
22 person is a minor under the age of 18 years, knowingly promotes,
23 employs, uses, persuades, induces, or coerces a minor under the
24 age of 18 years, or any parent or guardian of a minor under the
25 age of 18 years under his or her control who knowingly permits
26 the minor; to engage in or assist others to engage in either posing
27 or modeling alone or with others for purposes of preparing any
28 representation of information, data, or image, including, but not
29 limited to, any film, filmstrip, photograph, negative, slide,
30 photocopy, videotape, video laser disc, computer hardware,
31 computer software, computer floppy disc, data storage media,
32 CD-ROM, or computer-generated equipment or any other
33 computer-generated image that contains or incorporates in any
34 manner, any film, filmstrip, or a live performance involving; sexual
35 conduct by a minor under the age of 18 years alone or with other
36 persons or animals, is guilty of a felony. It is not necessary to prove
37 commercial purposes in order to establish a violation of this
38 subdivision.

39 (d) (1) As used in subdivisions (b) and (c), “sexual conduct”
40 means any of the following, whether actual or simulated: sexual

1 intercourse, oral copulation, anal intercourse, anal oral copulation,
2 masturbation, bestiality, sexual sadism, sexual masochism,
3 penetration of the vagina or rectum by any object in a lewd or
4 lascivious manner, exhibition of the genitals or pubic or rectal area
5 for the purpose of sexual stimulation of the viewer, any lewd or
6 lascivious sexual act as defined in Section 288, or excretory
7 functions performed in a lewd or lascivious manner, whether or
8 not any of the above conduct is performed alone or between
9 members of the same or opposite sex or between humans and
10 animals. An act is simulated when it gives the appearance of being
11 sexual conduct.

12 (2) As used in subdivisions (b) and (c), “matter” means any
13 film, filmstrip, photograph, negative, slide, photocopy, videotape,
14 video laser disc, computer hardware, computer software, computer
15 floppy disc, or any other computer-related equipment or
16 computer-generated image that contains or incorporates in any
17 manner, any film, filmstrip, photograph, negative, slide, photocopy,
18 videotape, or video laser disc.

19 (e) This section does not apply to a legally emancipated minor
20 or to lawful conduct between spouses if one or both are under the
21 age of 18 *years*.

22 (f) In every prosecution under this section involving a minor
23 under the age of 14 years at the time of the offense, the age of the
24 victim shall be pled and proven for the purpose of the enhanced
25 penalty provided in Section 647.6. Failure to plead and prove that
26 the victim was under the age of 14 years at the time of the offense
27 is not a bar to prosecution under this section if it is proven that the
28 victim was under the age of 18 years at the time of the offense.

29 (g) Violations of this section regarding each individual person
30 as specified above shall constitute a distinct and separate offense.

31 SEC. 6. Section 311.5 of the Penal Code is amended to read:

32 311.5. (a) Every person who writes, creates, or solicits the
33 publication or distribution of advertising or other promotional
34 material, or who in any manner promotes, the sale, distribution,
35 or exhibition of matter represented or held out by him *or her* to be
36 obscene, is guilty of a misdemeanor.

37 (b) The depiction of each individual person in material or matter
38 described in subdivision (a) shall constitute a distinct and separate
39 offense.

40 SEC. 7. Section 311.7 of the Penal Code is amended to read:

1 311.7. (a) Every person who, knowingly, as a condition to a
2 sale, allocation, consignment, or delivery for resale of any paper,
3 magazine, book, periodical, publication or other merchandise,
4 requires that the purchaser or consignee receive any obscene matter
5 or who denies or threatens to deny a franchise, revokes or threatens
6 to revoke, or imposes any penalty, financial or otherwise, by reason
7 of the failure of any person to accept obscene matter, or by reason
8 of the return of such obscene matter, is guilty of a misdemeanor.

9 (b) The depiction of each individual person in obscene matter
10 as provided in this section shall constitute a distinct and separate
11 offense.

12 SEC. 8. Section 311.10 of the Penal Code is amended to read:

13 311.10. (a) Any person who advertises for sale or distribution
14 any obscene matter knowing that it depicts a person under the age
15 of 18 years personally engaging in or personally simulating sexual
16 conduct, as defined in Section 311.4, is guilty of a felony and is
17 punishable by imprisonment in the state prison for two, three, or
18 four years, or in a county jail not exceeding one year, or by a fine
19 not exceeding fifty thousand dollars (\$50,000), or by both such
20 fine and imprisonment.

21 (b) Subdivision (a) shall not apply to the activities of law
22 enforcement and prosecution agencies in the investigation and
23 prosecution of criminal offenses.

24 (c) Advertisement as specified in subdivision (a) shall constitute
25 a distinct and separate offense for each individual person under
26 18 years of age depicted in the obscene matter.

27 SEC. 9. Section 311.11 of the Penal Code is amended to read:

28 311.11. (a) Every person who knowingly possesses or controls
29 any matter, representation of information, data, or image, including,
30 but not limited to, any film, filmstrip, photograph, negative, slide,
31 photocopy, videotape, video laser disc, computer hardware,
32 computer software, computer floppy disc, data storage media,
33 CD-ROM, or computer-generated equipment or any other
34 computer-generated image that contains or incorporates in any
35 manner, any film or filmstrip, the production of which involves
36 the use of a person under the age of 18 years, knowing that the
37 matter depicts a person under the age of 18 years personally
38 engaging in or simulating sexual conduct, as defined in subdivision
39 (d) of Section 311.4, is guilty of a felony and shall be punished by
40 imprisonment in the state prison, or a county jail for up to one

1 year, or by a fine not exceeding two thousand five hundred dollars
2 (\$2,500), or by both ~~the~~ *that* fine and imprisonment.

3 (b) Every person who commits a violation of subdivision (a),
4 and who has been previously convicted of a violation of this
5 section, an offense requiring registration under the Sex Offender
6 Registration Act, or an attempt to commit any of the
7 above-mentioned offenses, is guilty of a felony and shall be
8 punished by imprisonment in the state prison for two, four, or six
9 years.

10 (c) It is not necessary to prove that the matter is obscene in order
11 to establish a violation of this section.

12 (d) This section does not apply to drawings, figurines, statues,
13 or any film rated by the Motion Picture Association of America,
14 nor does it apply to live or recorded telephone messages when
15 transmitted, disseminated, or distributed as part of a commercial
16 transaction.

17 (e) The depiction of each individual person as described in this
18 section shall constitute a distinct and separate offense.

19 SEC. 10. It is the intent of the Legislature in enacting Sections
20 2 to 9, inclusive, of this act to abrogate the holding in *People v.*
21 *Hertzig* (2007) 156 Cal.App.4th 398.

22 SEC. 11. No reimbursement is required by this act pursuant to
23 Section 6 of Article XIII B of the California Constitution because
24 the only costs that may be incurred by a local agency or school
25 district will be incurred because this act creates a new crime or
26 infraction, eliminates a crime or infraction, or changes the penalty
27 for a crime or infraction, within the meaning of Section 17556 of
28 the Government Code, or changes the definition of a crime within
29 the meaning of Section 6 of Article XIII B of the California
30 Constitution.